GENERAL TESTAMENTARY POWERS AND THE RULE AGAINST PERPETUITIES.

HOW does the Rule against Perpetuities affect appointments under general testamentary powers? Or, to put the question in a concrete form: If personal property is bequeathed in trust to pay to such person as A. shall by will appoint, and A. appoints by will to B., who was not living at the death of the testator, for life, and on B.'s death to his children, is the appointment to B.'s children good? [1]

I have expressed the opinion that such appointment is bad.[2] My learned friend, Professor Kales, in an article which he kindly communicated to me, and has now published in this Review,[3] thinks that the appointment is good. Mr. Kales's suggestions on the law deserve so much respect, and to me personally have been so often valuable, that I am moved to say a word or two why I cannot adopt them in this matter.

In judging of the remoteness of an appointment, the time must be calculated from the date of the creation of the power and not from the date of its execution.[4] The reason of this is obvious: If a limitation would be bad, as too remote, it cannot be made good by delegating the power to make it to someone else. If what is given to the donee of a power is an authority to act for the settlor or testator, then the appointment by the donee must be considered as an appointment by the settlor or testator himself.[5] Now to this there is an apparent exception, which comes about in this wise: Sometimes what is in form an authority from a testator or settlor to make a limitation is, in substance, not an authority to

[1] I put the case in this form to avoid running against any peculiarities, real or supposed, of contingent remainders in realty.

[2] Gray, Rule against Perpetuities, 2 ed., §§ 526–526 *c*.

[3] 26 HARV. L. REV. 64.

[4] I have pointed out, Gray, Rule against Perpetuities, 2 ed., §§ 523–523 *b*, that this does not require us to give the words used in executing a power a meaning different from that with which they are used by the donee of the power.

[5] "One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent towards his principal. An agent cannot do that which the principal cannot do." Per Baldwin, C. J., 81 Conn. 34, 44.

make a limitation, but a limitation to the donee himself, a gift to him in fee. Such is the case when a general power is given to A. to appoint by deed. A. can there appoint to himself. When this is the case, A., the nominal donee, instead of going through the form of appointing to himself, may, so far as any question of remoteness is concerned, deal with the property as if he had gone through this form, and may treat it as he could any property of his own. That is, when A. makes what purports to be an appointment under such a power, what he really does is to make an appointment to himself, and then to grant his own property to the person named as appointee.[6]

Mr. Kales agrees with the general rule, and with the exception. The difference between us is this: Mr. Kales thinks the exception covers not only general powers, exercisable by deed, but also general testamentary powers. This I deny. Mr. Kales's argument is this: He takes up an expression, which I had used, that the exception applies when the donee is practically owner, and says that the question whether he is practically owner is to be determined at the time of the exercise of the power, and that when he exercises the power by will he is practically owner, and he illustrates thus: If a power is given to appoint by deed after the donee shall be married, he cannot appoint before he is married; his power to appoint is subject to the condition precedent of marriage, but after his marriage he can deal with the property as his own; so, Mr. Kales says, if a general testamentary power is given, it is a condition precedent that the donee shall die, but, when he has died, the condition precedent has been fulfilled, and he can deal by his will with the property as if it were his own.

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[6] An analogous situation is presented by Routledge *v.* Dorril, 2 Ves. Jr. 357. There a woman, having by her marriage settlement an exclusive power to appoint a fund among her issue, joined in the marriage settlement of a daughter, by which a part of the fund was put in trust for the daughter for life, with gift over to the daughter's children. The gift over was held good, that is, the daughter's marriage settlement was regarded as an appointment by the mother to the daughter and a settlement by the daughter as of her own property, though there was no formal appointment by the mother to the daughter. But in the same case the mother made a will in which she appointed another part of the fund to the daughter's children. The former transaction was regarded as an appointment by the mother to the daughter, and a settlement by the daughter. The second could not be regarded as an appointment to the daughter, but was an appointment to her children directly and was bad. See Gray, Rule against Perpetuities, 2 ed., §§ 528, 529.

But a man cannot, in the eye of the law, be at the same time alive and dead. So long as he is alive, the condition necessary for the exercise of the power is not fulfilled, and after he is dead he cannot be an appointee. And this is not only so as a metaphysical necessity. When a donee is given a general power by deed on his marriage, the creator of the power means to give the nominal donee on his marriage the absolute interest in the property; he does not mean to delegate his own right to make a limitation. But when he gives a testamentary power, he distinctly means that the donee shall have only a delegated authority; he does not mean at any time, or on the performance of any condition, to make a gift to the donee himself. When there is a power by deed given, the creator of the power means that at some time or on some condition the donee shall have in substance the fee. When a testamentary power is given, the creator as distinctly means that the donee shall never have the fee.

There is no dispute that the exception does not extend to special powers. Now, as a practical matter, from the point of view of the Rule against Perpetuities, there is no difference between a testamentary general power and a special power.

Suppose in the first place A. gives property to B. for life, with a power to appoint by will to B.'s issue (a special power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The gift to C.'s issue is unquestionably bad, as it is to vest on the death of a person born after A.'s death.

Suppose, in the second place, that A. gives property to B. for life, with a power of appointment by will to whomsoever he pleases (a general power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The limitations of the property are precisely the same in both cases; in both it is tied up during the lives of B. and C., and on C.'s death given to his surviving children. Practically there is absolutely no difference. And yet if appointments under general testamentary powers are referred to the time of their exercise, the gift to C.'s children is bad in one case and good in the other.

The donee of a power may be a person living at the date of the settlement or of the testator's death, or he may be a person then unborn.

Let us take the latter first.

First: When the power is given to an unborn person. The typical case is when, by a marriage settlement, property is given to the husband and wife for their joint lives, and on their deaths to such one or more of the children as the parents or the survivor of them may appoint. Here, if the surviving parent appoints to such persons as any one of the children may by deed appoint, an appointment by the child is good;[7] but if the power given by the surviving parent to its child is testamentary, an appointment by the child is bad for remoteness.[8]

Mr. Kales recognizes that these cases state the law correctly, but he says they do not apply when the power is given to a living person. Let us take that up.

Second: When the power is given to a living person. The distinction that Mr. Kales makes between this case and the former is, that in the former the power itself is too remote, while in this the power is good in its inception, and if there is remoteness it is only in the appointment. But here an expression which I may have used, following other authorities, has, I think, led Mr. Kales into error. Remoteness, in connection with the Rule against Perpetuities, is a quality to be attributed to an estate or interest; a power is neither, and remoteness is not properly to be predicated of it.

It is true that no appointment under a power which may be exercised later than twenty-one years after a life in being is good, but it is not the whole truth, and it does not expressly state the reason why an estate appointed under such a power is too remote. The reason is this: No interest is good if its vesting is subject to a condition precedent which may be fulfilled beyond the required limits; the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised; if the power can be exercised beyond the required limits, the condition precedent may be fulfilled beyond the limits, and therefore the interest appointed under the power will be too remote.

But the exercise of a power may not be the only condition precedent to the vesting of an appointed estate, and therefore the exer-

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[7] Bray *v.* Bree, 2 Cl. & F. 453 (1834).

[8] Wollaston *v.* King, L. R. 8 Eq. 165 (1869); Morgan *v.* Gronow, L. R. 16 Eq. 1, 9, 10 (1873).

cise of a power may be confined to a life in being, and yet no good appointment can be made under it. For instance, a power may be given to a living person to make an appointment to take effect upon the indefinite failure of someone's issue. No good appointment can be made under this power.[9]

When a testamentary power is given to a living person, two conditions precedent must be fulfilled in order that an appointment under it shall vest. The first condition precedent is that the power be exercised by the donee; as the donee is alive when the power is created, this condition precedent must be fulfilled within or at the end of a life in being, and therefore its existence will not render an appointment under the power too remote. But there is another condition precedent, namely, that the appointment vest within twenty-one years after a life in being, and accordingly an appointment which may not vest within that time is too remote. Thus, if a general testamentary power is given to A., and A. appoints to B., an unborn person, for life, and after his death to B.'s surviving issue, the appointment to B. is good, because both the conditions precedent must be fulfilled within the required limits, but the appointment to B.'s surviving issue is too remote, because, though the first of the conditions precedent cannot be fulfilled later than a life in being, the second may be.

Or, in other words, an appointment under a testamentary power is subject to the condition precedent that a life, the only life in question, has terminated; the estate appointed will therefore be too remote unless it must vest within twenty-one years after the death of the donee, and this is true whether the donee is alive or is an unborn person. If he is an unborn person, no appointment will be good, because of another condition precedent, namely, the exercise of the power within the period required. *But the question of the remoteness of an appointment under a power exercisable by deed is the same whether the power be to an unborn or to a living person, because such a power is not really a power at all, but is a direct limitation in fee.*

As to the authorities:

That the remoteness of an appointment under a general testa-

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[9] Bristow *v.* Boothby, 2 S. & St. 465; Gray, Rule against Perpetuities, 2 ed., § 476 *a*.

mentary power must be calculated from the time of the creation of the power in the case when the power is given to a living person as well as when it is given to an unborn person, the leading authority is *In re* Powell's Trusts,[10] in which the decision was made by James, V. C. This decision has been followed by the American courts.[11]

There are two English cases and one Irish which are *contra* and hold that a general testamentary power to a living person should, like a general power by deed, be calculated, on the question of remoteness, from the time of the exercise of the power, and not from the time of its creation. These cases are Rous *v.* Jackson,[12] *In re* Flower,[13] and Stuart *v.* Babington.[14] The last two cases simply follow and rest upon Rous *v.* Jackson, and that case is the only one which needs to be considered.

Mr. Justice Chitty, who was the judge in that case, recognizes that he is differing from *In re* Powell's Trusts, and that "the question therefore arises whether the decision [in that case] is consistent with the course of authorities." He comes to the conclusion that the "Vice-Chancellor in that case fell into an error," and that "there must be some error, some slip, in the decision of James, V. C., in *In re* Powell's Trusts."

The statement of the authorities which Chitty, J., deems inconsistent with the decision in *In re* Powell's Trusts he gives in the following passage:

"Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers (Sugden on Powers, 8th ed.), 394, says: 'A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases.' He draws no distinction between a power exercisable by deed or will or by will only and it appears to me to make no difference by what instrument the power

[10] 39 L. J. Ch. 188 (1869).

[11] Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521 (1890); Boyd's Estate, 199 Pa. St. 487; Genet *v.* Hunt, 113 N. Y. 158, 21 N. E. 91 (1889) (the case of Frear *v.* Pugsley, 9 N. Y. Misc. 316, *contra*, is only a decision of a single judge at Special Term, made without discussion, and in view of Genet *v.* Hunt need not be considered); Reed *v.* McIlvain, 113 Md. 140 (1910).

[12] 29 Ch. D. 521 (1885).

[13] 55 L. J. Ch. 200 (1885).

[14] L. R. 27 Ir. 551 (1891).

is made exercisable. Lord St. Leonards also says (395): 'Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it.' He goes on to quote Mr. Powell's note to Fearne's Executory Devises (p. 5), in favor of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee.

"There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established 'after a series of cases.' Butler's Coke upon Littleton (272 *a*)." [15]

But the learned judge does not give all that is said by the authors whom he cites, and what he omits shows beyond doubt that they were referring to powers exercisable by deed, for the language in the omitted places is utterly inapplicable to general testamentary powers. Thus, at the end of the first extract from his book on Powers, Lord St. Leonards, after the word "pleases," adds:

"he has an absolute disposing power over the estate, *and may bring it into the market, whenever his necessities or wishes may lead him to do so.*"

So when considering Powell's note, Lord St. Leonards says: [16]

"To take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to a perpetuity, is created. *The donee may sell the estate the next moment.*"

So Butler [17] says:

"A general power of appointment has no tendency to a perpetuity, as from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation, inconsistent with that fee."

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[15] This is a wrong reference. Butler's note on the subject is to Co. Lit. 271 *b*. The true reference appears in the report of Rous *v.* Jackson, 54 L. J. Ch. 7[illegible]

[16] Sugden, Powers, 396.

[17] In his note to Co. Lit. [illegible]

It should be observed that whereas in this country testamentary powers are more common than powers exercisable by deed, in England powers exercisable by deed, or by deed and will, are the more usual, and when English judges and writers speak of a general power they ordinarily mean powers which can be exercised by deed as well as by will.

It is therefore submitted that the American courts have done well, both on principle and on authority, in following *In re* Powell's Trusts rather than the later case of Rous *v.* Jackson.[18]

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NOTE.

If A owns property and devises it, the remoteness of the interests limited are determined by reference to his death. Whether he has owned the property during his entire life or acquired it only the moment before his death, the rule is the same. The fact that he acquired the property the moment before his death and therefore had, practically speaking, no power to enjoy or alienate it in his lifetime is immaterial.

A, with a general power to appoint by deed, is in the same position as the owner in fee who enjoyed such ownership during his life. A, with a general power to appoint by will only, is in the same position as the person who acquires property the moment before he dies. If the remoteness of the interests appointed are to be determined as of the date of appointment in the former case because it is the same as if A had the fee during his lifetime, why should not the remoteness of the interests appointed be determined as of the date of the appointment in the latter case because it is the same as if A had acquired the property the moment before he died?

In short, if you make no difference between the case where A owns property during his lifetime and the case where he acquires

[18] The advantage from using a power instead of making a direct gift is, not that you can do through a power what you cannot do directly, but that a limitation which would be valid, but which it could not be originally seen would affect a desired end, may be later seen to do so. See an instance in Gray, Rule against Perpetuities, 2 ed., § 523 *e*.

it only the moment before death, why should you make any difference between the case where A has a general power of appointment by deed in his lifetime and the case where he has a general power to appoint by will only at his death?

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